International Law Studies—Volume 27

International Law Situations

Situation III

ARMED MERCHANT VESSELS

States X and Y are at war. Other states are neutral. Some of the merchant vessels of states X and Y are armed and some are unarmed.

State A admits armed merchant vessels to its ports on the same terms as other merchant vessels.

State B excludes all armed merchant vessels from its ports.

State C admits armed merchant vessels to its ports under the same rules as vessels of war and admits unarmed merchant vessels as in the time of peace.

State X protests against the regulations of states A and C.

State Y protests against the regulations of states B and C.

How far are the protests valid?

SOLUTION

Practice and opinion since 1914 afford some support for the position of each neutral and for the protest of each belligerent, but the position of state C seems to be gaining support. The whole situation shows the need of clear determination of the status of armed merchant vessels.

NOTES

General.—During and since the World War the status of armed merchant vessels has been a subject of much difference of opinion. It has been referred to in many diplomatic notes and in proclamations. There were armed merchant vessels in early times. The prevalence of piracy and the use of privateers made arming seem necessary for safety. Slave trading was made piracy by a British act of Parliament in 1825. Smuggling caused

many complications at about this period and earlier. In some remote coasts there was little protection for vessels other than such force as they might themselves muster. The reasons for arming were mainly for self-protection in time of peace and in time of war before privateering was declared abolished in 1856.

Early policy of the United States.—In 1797 President Adams said he entertained no doubt—

> of the policy and propriety of permitting our vessels to employ means of defense while engaged in a lawful foreign commerce. It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war.

An act of June 25, 1798 (1 Stat. L. 572), provided that an American merchant vessel "may oppose and defend itself against any search, restraint, or seizure which shall be attempted upon such vessel."

Later legislation provided that:

> The Commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States. (Act Mar. 3, 1819, 3 Stat. p. 513, temporary act till next session of Congress; made permanent by act Jan. 30, 1823, 3 Stat. p. 721.)

Declaration of Paris, 1856.—The Declaration of Paris, 1856, provided "Privateering is and remains abolished" with the idea that privately armed vessels would no longer be used in war. Subsidized vessels, volunteer fleets, etc., were at first regarded with suspicion but later were generally accepted.

Attitude of United States, late nineteenth century.—After the Declaration of Paris, 1856, the United States was particularly careful to explain that the laws did not forbid arming "solely for the purpose of defense and self-protection." There was, however, much concern lest vessels should be armed in the United States and subsequently engage in filibustering expeditions, and armed vessels were required to give bonds to double their value in order to discourage such activities, showing that arming was not regarded as essential to safety of the vessel. The attitude of other states had been somewhat similar in regard to arming.

Pre-war British attitude.—In his speech upon the naval estimate on Wednesday, March 26, 1913, Mr. Churchill after speaking more particularly of the material of the Navy and of protection against airships said:

> I turn to one aspect of trade protection which requires special reference. It was made clear at the Second Hague Conference that certain of the Great Powers have reserved to themselves the right to convert merchant steamers into cruisers, not merely in national harbours, but if necessary on the high seas. There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. The sea-borne trade of the world follows well-marked routes, upon nearly all of which the tonnage of the British Mercantile Marine largely predominates. Our food-carrying liners and vessels carrying raw material following these trade routes would, in certain contingencies, meet foreign vessels armed and equipped in the manner described. If the British ships had no armament, they would be at the mercy of any foreign liners carrying one effective gun and a few rounds of ammunition. It would be obviously absurd to meet the contingency of considerable numbers of foreign armed merchant cruisers on the high seas by building an equal number of cruisers. That would expose this country to an expenditure of money to meet a particular danger altogether disproportionate to the expense caused to any foreign Power in creating that danger. Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in her own defence.

This is the position to which the Admiralty have felt it necessary to draw the attention of leading shipowners. We have felt justified in pointing out to them the danger to life and property which would be incurred if their vessels were totally incapable of offering any defense to an attack. The shipowners have responded to the Admiralty invitation with cordiality, and substantial progress has been made in the direction of meeting it by preparing as a defensive measure to equip a number of first-class British liners to repel the attack of armed foreign merchant cruisers. Although these vessels have, of course, a wholly different status from that of the regularly commissioned merchant cruisers, such as those we obtain under the Cunard agreement, the Admiralty have felt that the greater part of the cost of the necessary equipment should not fall upon the owners, and we have decided, therefore, to lend the necessary guns, to supply ammunition, and to provide for the training of members of the ship's company to form the guns' crews. The owners on their part are paying the cost of the necessary structural conversion, which is not great. The British Mercantile Marine will, of course, have the protection of the Royal Navy under all possible circumstances, but it is obviously impossible to guarantee individual vessels from attack when they are scattered on their voyages all over the world. No one can pretend to view these measures without regret, or without hoping that the period of retrogression all over the world which has rendered them necessary may be succeeded by days of broader international confidence and agreement than those through which we are now passing. (Parliamentary Debates, Commons [1913], vol. 50, p. 1776.)

On June 10, 1913, Mr. Churchill (First Lord of the Admiralty) said:

The House will perhaps allow me to take the opportunity of clearing up a misconception which appears to be prevalent. Merchant vessels carrying guns may belong to one or other of two totally different classes. The first class is that of armed merchant cruisers which on the outbreak of war would be commissioned under the White Ensign and would then be indistinguishable in status and control from men-of-war. In this class belong the *Mauretania* and *Lusitania*. The second class consists of merchant vessels, which would (unless specially taken up by the Admiralty for any purpose) remain merchant vessels in war, without any change of status, but have been equipped by their owners, with Admiralty assistance, with a defensive

armament in order to exercise their right of beating off attack. (Parliamentary Debates, Commons [1913], vol. 53, p. 1431.)

On June 11, 1913, in reply to a question as to whether merchant ships were "equipped for defense only and not for attack," Mr. Churchill said:

Surely these ships will be quite valueless for the purposes of attacking armed vessels of any kind. What they are serviceable for is to defend themselves against the attack of other vessels of their own standing. (Parliamentary Debates, Commons, 1913, vol. 53, p. 1599.)

Again on March 17, 1914, Mr. Churchill, speaking for the British Government, said of armed merchant ships:

* * * by the end of 1914–15 seventy ships will have been so (two 4.7 guns) armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. * * * They are not allowed to fight with any ships of war. * * * They are, however, thoroughly capable of self-defense against an enemy's armed merchantman. (Parliamentary Debates, Commons, 1914, vol. 59, 1925.)

Late German attitude.—The counselor of the German Imperial Navy Department, Dr. George Schram, said in 1913:

Self-defense is defined as a defense against any unlawful encroachment upon a legal right. (Das Prisenrecht, p. 308.)

It is doubtful in particular cases in what the criterion of forcible resistance consists, especially whether preparations, e. g.: equipment of the vessel with suitable armament, would entail the legal consequences of resistance. This question must be answered in the negative. Preparations or the mere attempt to escape do not constitute in themselves a forcible defense; they do not encroach upon the legal rights of the belligerent. (Ibid. p. 310.)

Early British notes on armed merchant vessels in World War.—Great Britain declared war against Germany on August 4, 1914. On the same day the British chargé in Washington sent to the Secretary of State a communication in regard to the arming of merchant vessels in neutral waters, and other notes followed.

The British Chargé to the Secretary of State

(No. 252.) BRITISH EMBASSY,
Washington, August 4, 1914.

SIR: In view of the state of war now existing between Great Britain and Germany, I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to make the following communication to you in respect to the arming of any merchant vessels in neutral waters.

As you are aware it is recognized that a neutral Government is bound to use due diligence to prohibit its subjects or citizens from the building and fitting out to order of belligerent vessels intended for warlike purposes and also to prevent the departure of any such vessels from its jurisdiction. The starting point for the universal recognition of this principle was the three rules formulated in Article VI of the Treaty between Great Britain and the United States of America for the amicable settlement of all causes of differences between the two countries, signed at Washington on May 8, 1871. These rules, which His Majesty's Government and the United States Government agreed to observe as between themselves in future, are as follows:

"A neutral Government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The above rules may be said to have acquired the force of generally recognized rules of International Law, and the first of them is reproduced almost textually in Article VIII of The Hague Convention Number 13 of 1907 concerning the Rights and Duties of Neutral Powers in case of Maritime Warfare, the principles of which have been agreed to by practically every maritime State.

It is known, however, that Germany, with whom Great Britain is at war, favours the policy of converting her merchant vessels

into armed ships on the High Seas, and it is probable, therefore, that attempts will be made to equip and despatch merchantmen for such conversion from the ports of the United States.

It is probable that, even if the final completion of the measures to fit out merchantmen to act as cruisers may have to be effected on the High Seas, most of the preliminary arrangements will have been made before the vessels leave port, so that the warlike purpose to which they are to be put after leaving neutral waters must be more or less manifest before their departure.

In calling your attention to the above mentioned "Rules of the Treaty of Washington" and The Hague Convention, I have the honour to state that His Majesty's Government will accordingly hold the United States Government responsible for any damages to British Trade or shipping, or injury to British interests generally, which may be caused by such vessels having been equipped at, or departing from, United States ports.

I have, etc.,

COLVILLE BARCLAY.

(Spec. Sup. Am. Jour. Int. Law, vol. 9, July, 1915, p. 222.)

The British Chargé d'Affaires to the Secretary of State

(No. 259.) BRITISH EMBASSY,
Washington, August 9, 1914.

SIR: With reference to my note No. 252 of the 4th instant, I have the honour to inform you that I have now received instructions from Sir Edward Grey to make a further communication to you in explanation of the position taken by His Majesty's Government in regard to the question of armed merchantmen.

As you are no doubt aware, a certain number of British merchant vessels are armed, but this is a precautionary measure adopted solely for the purpose of defence, which, under existing rules of international law, is the right of all merchant vessels when attacked.

According to British rule, British merchant vessels can not be converted into men-of-war in any foreign port, for the reason that Great Britain does not admit the right of any Power to do this on the High Seas. The duty of a neutral to intern or order the immediate departure of belligerent vessels is limited to actual and potential men-of-war, and in the opinion of His Majesty's Government, there can therefore be no right on the part of neutral Governments to intern British armed merchant vessels, which can not be converted into men-of-war on the

High Seas, nor to require them to land their guns before proceeding to sea.

On the other hand, the German Government have consistently claimed the right of conversion on the High Seas, and His Majesty's Government therefore maintain their claim that vessels which are adapted for conversion and under German rules may be converted into men-of-war on the High Seas should be interned in the absence of binding assurances, the responsibility for which must be assumed by the neutral Government concerned, that they shall not be so converted.

I have, etc.,

COLVILLE BARCLAY.

(Ibid. p. 223.)

THE BRITISH CHARGÉ TO THE SECRETARY OF STATE

BRITISH EMBASSY,
Washington, August 12, 1914.

SIR: With reference to my notes Nos. 252 and 259 of August 4 and August 9, respectively, stating and explaining the position taken up by His Majesty's Government in regard to the question of armed merchantmen, I have the honor to state that I have now been informed by Sir Edward Grey that exactly similar instructions were at the same time issued by him to His Majesty's representatives in practically all neutral countries to address the same communications to the respective Governments to which they were accredited.

COLVILLE BARCLAY.

(Ibid. p. 224.)

Reply of the United States.—The United States in a note of August 19, 1914, reviewed briefly the British notes and showed that France and Russia had upheld the right of conversion on the high seas as well as Austria and Germany, while Great Britain and Belgium had opposed this right at The Hague Conference in 1907. Great Britain had later maintained that there was no rule of international law on the subject. Referring to the last clause of the British note of August 4, 1914, in which the responsibility of the United States was declared, the American note said:

It seems obvious therefore that by neither the terms nor the interpretation of the provisions of the treaties on this point is the

United States bound to assume the attitude of an insurer. Consequently the United States disclaims as a correct statement of its responsibility the assertion in your note that "His Majesty's Government will accordingly hold the United States Government responsible for any damages to British trade or shipping, or injury to British interests generally, which may be caused by such vessels having been equipped at, or departing from, United States ports." (Ibid. p. 228.)

British assurances, 1914.—Sir Cecil Spring-Rice wrote to the Secretary of State, August 25, 1914:

(No. 289.) BRITISH EMBASSY,
Washington, August 25, 1914.

With reference to Mr. Barclay's notes Nos. 252 and 259 of the 4th and 9th of August, respectively, fully explaining the position taken up by His Majesty's Government in regard to the question of armed merchantmen, I have the honour, in view of the fact that a number of British armed merchantmen will now be visiting United States ports, to reiterate that the arming of British merchantmen is solely a precautionary measure adopted for the purpose of defense against attack from hostile craft.

I have at the same time been instructed by His Majesty's Principal Secretary of State for Foreign Affairs to give the United States Government the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defence, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel. (Ibid., p. 230.)

To this the State Department replied as follows:

DEPARTMENT OF STATE,
Washington, August 29, 1914.

I have the honor to acknowledge the receipt of your note of the 25th instant in which, referring to previous correspondence, you state that, in view of the fact that a number of British armed merchantmen will now be visiting United States ports, you desire to reiterate that the arming of British merchantmen is solely a precautionary measure adopted for the purpose of defence against attack from hostile craft. You add that you have been instructed by His Majesty's Principal Secretary of State for Foreign Affairs to give the Government of the United States the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defence, that they will never fire unless first fired upon, and

that they will never under any circumstances attack any vessel. (Ibid. p. 230.)

The *Adriatic*, armed with four guns, and the *Merrion*, armed with six guns, had entered ports of the United States and the American Government foresaw complications in maintaining neutrality and so notified British authorities. The British ambassador states on September 4, 1914:

I have now received a reply from Sir Edward Grey, in which he informs me that His Majesty's Government hold the view that it is not in accordance with neutrality and international law to detain in neutral ports merchant vessels armed with purely defensive armaments. But in view of the fact that the United States Government is detaining armed merchant vessels prepared for offensive warfare, and in order to avoid the difficult questions of the character and degree of armament which would justify detention, His Majesty's Government have made arrangements for landing the guns of the *Merrion*, the *Adriatic* having already sailed before the orders reached her. In the case of the latter ship, the passenger list and cargo had proved that she was proceeding to sea on ordinary commercial business. These and other papers relative to the case will be duly communicated to your Department.

This action has been taken without prejudice to the general principle which His Majesty's Government have enunciated and to which they adhere. (Ibid. p. 231.)

The British position was further set forth in memoranda of September 9, 1914:

A merchant vessel armed purely for self-defence is therefore entitled under international law to enjoy the status of a peaceful trading ship in neutral ports and His Majesty's Government do not ask for better treatment for British merchant ships in this respect than might be accorded to those of other Powers. They consider that only those merchant ships which are intended for use as cruisers should be treated as ships of war and that the questions whether a particular ship carrying an armament is intended for offensive or defensive action must be decided by the simple criterion whether she is engaged in ordinary commerce and embarking cargo and passengers in the ordinary way. If so, there is no rule in international law that would justify such vessel even if armed being treated otherwise than as a peaceful trader.

In urging this view upon the consideration of the United States Government the British Ambassador is instructed to state that it is believed that German merchant vessels with offensive armament have escaped from American ports, especially from ports in South America to prey upon British commerce in spite of all the precautions taken. German cruisers in the Atlantic continue by one means or another to obtain ample supplies of coal shipped to them from neutral ports, and if the United States Government take the view that British merchant vessels which are bona fide engaged in commerce and carry guns at the stern only are not permitted purely defensive armament, unavoidable injury may ensue to British interests and indirectly also to United States trade which will be deplorable. (Ibid. p. 233.)

Memorandum of State Department, September 19, 1914.—The attitude of the Department of State was made known in a memorandum aimed to set forth physical bases for determination of the intent of arming merchant vessels.

THE STATUS OF ARMED MERCHANT VESSELS

A

A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war.

B

The presence of an armament and ammunition on board a merchant vessel creates a presumption that the armament is for offensive purposes, but the owners or agents may overcome this presumption by evidence showing that the vessel carries armament solely for defense.

C

Evidence necessary to establish the fact that the armament is solely for defense and will not be used offensively, whether the armament be mounted or stowed below, must be presented in each case independently at an official investigation. The result of the investigation must show conclusively that the armament is not intended for, and will not be used in, offensive operations.

Indications that the armament will not be used offensively are:

1. That the caliber of the guns carried does not exceed six inches.

2. That the guns and small arms carried are few in number.

3. That no guns are mounted on the forward part of the vessel.

4. That the quantity of ammunition carried is small.

5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.

6. That the vessel intends to and actually does clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade in which it was engaged before war was declared.

7. That the vessel takes on board fuel and supplies sufficient only to carry it to its port of destination, or the same quantity substantially which it has been accustomed to take for a voyage before war was declared.

8. That the cargo of the vessel consists of articles of commerce unsuited for the use of a ship of war in operations against an enemy.

9. That the vessel carries passengers who are as a whole unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or of any of its allies, and particularly if the passenger list included women and children.

10. That the speed of the ship is slow.

D

Port authorities, on the arrival in a port of the United States of an armed vessel of belligerent nationality, claiming to be a merchant vessel, should immediately investigate and report to Washington on the foregoing indications as to the intended use of the armament, in order that it may be determined whether the evidence is sufficient to remove the presumption that the vessel is, and should be treated as, a ship of war. Clearance will not be granted until authorized from Washington, and the master will be so informed upon arrival.

E

The conversion of a merchant vessel into a ship of war is a question of fact which is to be established by direct or circumstantial evidence of intention to use the vessel as a ship of war. (Ibid. p. 234.)

German attitude.—Mr. Gerard transmitted a note from the German foreign office on October 15 which referred to the memorandum of September 19, 1914. This note says:

It is a question whether or not ships thus armed should be admitted into ports of a neutral country at all. Such ships,

in any event, should not receive any better treatment in neutral ports than a regular warship, and should be subject as least to the rules issued by neutral nations restricting the stay of a warship. If the Government of the United States considers that it fulfills its duty as a neutral nation by confining the admission of armed merchant ships to such ships as are equipped for defensive purposes only, it is pointed out that so far as determining the warlike character of a ship is concerned, the distinction between the defensive and offensive is irrelevant. The destination of a ship for use of any kind in war is conclusive, and restrictions as to the extent of armament afford no guarantee that ships armed for defensive purposes only will not be used for offensive purposes under certain circumstances. (Ibid. p. 238.)

On November 7 the United States expressed its dissent from the German point of view, reaffirmed the principles of the memorandum of September 19 and expressed "disapprobation of a practice which compelled it to pass upon a vessel's intended use" and further stated:

As a result of these representations no merchant vessel with armaments have visited the ports of the United States since the 10th of September. In fact from the beginning of the European war but two armed private vessels have entered or cleared from ports of this country and as to these vessels their character as merchant vessels was conclusively established.

Please bring the foregoing to the attention of the German Government and in doing so express the hope that they will also prevent their merchant vessels from entering the ports of the United States carrying armaments even for defensive purposes though they may possess the right to do so by the rules of international law. (Ibid. p. 239.)

Proposals of Department of State, January 18, 1916.— The treatment of armed merchant vessels became a matter of discussion in Congress and elsewhere, and further correspondence. In an informal and confidential letter the Department of State made certain propositions, as follows:

In order to bring submarine warfare within the general rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce, I believe that a formula may be found which, though it may require slight modifications of the practice generally followed by nations prior

to the employment of submarines, will appeal to the sense of justice and fairness of all the belligerents in the present war.

Your excellency will understand that in seeking a formula or rule of this nature I approach it of necessity from the point of view of a neutral, but I believe that it will be equally efficacious in preserving the lives of all noncombatants on merchant vessels of belligerent nationality.

My comments on this subject are predicated on the following propositions:

1. A noncombatant has a right to traverse the high seas in a merchant vessel entitled to fly a belligerent flag and to rely upon the observance of the rules of international law and principles of humanity if the vessel is approached by a naval vessel of another belligerent.

2. A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

3. An enemy merchant vessel when ordered to do so by a belligerent submarine, should immediately stop.

4. Such vessel should not be attacked after being ordered to stop unless it attempts to flee or to resist, and in case it ceases to flee or resist, the attack should discontinue.

5. In the event that it is impossible to place a prize crew on board of an enemy merchant vessel or convoy it into port, the vessel may be sunk, provided the crew and passengers have been removed to a place of safety.

In complying with the foregoing propositions which, in my opinion, embody the principal rules, the strict observance of which will insure the life of a noncombatant on a merchant vessel which is intercepted by a submarine, I am not unmindful of the obstacles which would be met by undersea craft as commerce destroyers.

Prior to the year 1915 belligerent operations against enemy commerce on the high seas had been conducted with cruisers carrying heavy armaments. Under those conditions international law appeared to permit a merchant vessel to carry an armament for defensive purposes without losing its character as a private commercial vessel. This right seems to have been predicated on the superior defensive strength of ships of war, and the limitation of armament to have been dependent on the fact that it could not be used effectively in offense against enemy naval vessels, while it could defend the merchantmen against the generally inferior armament of piratical ships and privateers.

The use of the submarine, however, has changed these relations. Comparison of the defensive strength of a cruiser and a submarine shows that the latter, relying for protection on its

power to submerge, is almost defenseless in point of construction. Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.

If a submarine is required to stop and search a merchant vessel on the high seas and, in case it is found that she is of enemy character and that conditions necessitate her destruction, to remove to a place of safety all persons on board, it would not seem just or reasonable that the submarine should be compelled, while complying with these requirements, to expose itself to almost certain destruction by the guns on board the merchant vessel.

It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.

In presenting this formula as a basis for conditional declarations by the belligerent Governments, I do so in the full conviction that your Government will consider primarily the humane purpose of saving the lives of innocent people rather than the insistence upon a doubtful legal right which may be denied on account of new conditions. (Spec. Sup. Am. Jour. Int. Law, vol. 10, Oct. 1916, p. 310.)

Replies.—A German note of February 10, 1916, with its numerous exhibits aimed to support the conclusion that under the circumstances of the existing hostilities "enemy merchantmen armed with guns no longer have any right to be considered as peaceable vessels of commerce."

On March 23, 1916, after consulting the allied Governments the British Government communicated its views on the letter of January 18, 1916, in a memorandum.

This memorandum gave little attention to the propositions of the Secretary of State but enumerated cases in which it was claimed the enemy has disregarded the law. The memorandum did say, however:

Upon perusal of the personal letter addressed under date of January 18th last, by the Honorable Secretary of State of the United States to the Ambassador of England at Washington, the Government of His Britannic Majesty could not but appreciate the lofty sentiments by which Mr. Lansing was inspired on submitting to the countries concerned certain considerations touching the defensive armament of merchant vessels. But the enemy's lack of good faith, evidenced in too many instances to permit of their being regarded as isolated accidents justifies the most serious doubt as to the possibility of putting into practice the suggestions thus formulated.

From a strictly legal standpoint, it must be admitted that the arming of merchant vessels for defense is their acknowledged right. It was established in some countries by long usage, in other countries it was expressly sanctioned by the legislator, such being the case in the United States, in particular.

It being so, it seems obvious that any request that a belligerent forego lawful means of protection from the enemy's unlawful attacks places, upon him, whoever he may be, who formulates the proposition, the duty and responsibility of compelling that enemy to desist from such attacks, for the said enemy would otherwise be encouraged rather to persist in that course. Now the suggestions above referred to do not provide any immediately efficacious sanction. (Spec. Sup. Am. Jour. Int. Law, vol. 10, Oct. 1916, p. 336.)

And later in the same memorandum Great Britain after imputing faithlessness to Germany as well as lawlessness, says:

At the end of his letter, the Honorable Secretary of State hypothetically considered the possibility of eventual decisions under which armed merchant vessels might be treated as auxiliary cruisers.

It is His Britannic Majesty's Government's conviction that the realization of such a hypothesis which would materially modify, to Germany's advantage, the statement of views published in this respect by the American Government on September 19, 1914, can not be given practical consideration by the American authorities.

Such a modification indeed would be inconsistent with the general principles of neutrality as sanctioned in paragraphs 5 and 6

of the preamble to the 13th convention of The Hague concerning maritime neutrality. Moreover the result would be contrary to the stipulations of the 7th convention of The Hague concerning the transformation of merchant vessels into warships. Finally if armed merchant vessels were to be treated as auxiliary cruisers, they would possess the right of making prizes, and this would mean the revival of privateering. (Ibid. p. 337.)

The Secretary of State replied, diplomatically stating that it becomes his duty to accept the reply of the Entente Governments "as final, and in the spirit in which they have made it."

American memorandum, March 25, 1916.—On March 25, 1916, a memorandum prepared by the direction of the President, but unsigned, though issued by the Department of State, was made public as a statement of the "Government's attitude" on the status of armed merchant vessels. This memorandum considered the status of an armed merchant vessel from the point of view of the "neutral when the vessel enters its ports" and from the point of view of "an enemy when the vessel is on the high seas." Among other statements in this memorandum are the following:

(1) It is necessary for a neutral Government to determine the *status* of an armed merchant vessel of belligerent nationality which enters its jurisdiction, in order that the Government may protect itself from responsibility for the destruction of life and property by permitting its ports to be used as bases of hostile operations by belligerent warships.

(2) If the vessel carries a commission or orders issued by a belligerent Government and directing it under penalty to conduct aggressive operations, or if it is conclusively shown to have conducted such operations, it should be regarded and treated as a warship.

(3) If sufficient evidence is wanting, a neutral Government, in order to safeguard itself from liability for failure to preserve its neutrality, may reasonably presume from the facts the *status* of an armed merchant vessel which frequents its waters. There is no settled rule of international law as to the sufficiency of evidence to establish such presumption. As a result a Government must decide for itself the sufficiency of the evidence which it requires to determine the character of the vessel. For the guid-

ance of its port officers and other officials a neutral Government may therefore declare a standard of evidence, but such standard may be changed on account of the general conditions of naval war fare or modified on account of the circumstances of a particular case. These changes and modifications may be made at any time during the progress of the war, since the determination of the *status* of an armed merchant vessel in neutral waters may affect the liability of a neutral Government. * * *

The status of an armed merchant vessel as a warship in neutral waters may be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case. * * *

(1) It appears to be the established rule of international law that warships of a belligerent may enter neutral ports and accept limited hospitality there upon condition that they leave, as a rule, within 24 hours after their arrival.

(2) Belligerent warships are also entitled to take on fuel once in three months in ports of a neutral country.

(3) As a mode of enforcing these rules a neutral has the right to cause belligerent warships failing to comply with them, together, with their officers and crews, to be interned during the remainder of the war.

(4) Merchantmen of belligerent nationality, armed only for purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

(5) Armed merchantmen of belligerent nationality under a commission or orders of their Government to use, under penalty, their armament for aggressive purposes, or merchantmen which, without such commission or orders, have used their armaments for aggressive purposes, are not entitled to the same hospitality in neutral ports as peaceable armed merchantmen. (Spec. Sup. Am. Jour. Int. Law, vol. 10, pp. 367, 369.)

The memorandum later refers to the status of armed merchant vessels on the high seas, enumerating various relations. The memorandum states:

(11) A merchantman entitled to exercise the right of self-protection may do so when certain of attack by an enemy warship, otherwise the exercise of the right would be so restricted as to render it ineffectual. There is a distinct difference, however, between the exercise of the right of self-protection and the act of cruising the seas in an armed vessel for the purpose of attacking enemy naval vessels.

(12) In the event that merchant ships of belligerent nationality are armed and under commission or orders to attack in all circumstances certain classes of enemy naval vessels for the purpose of destroying them, and are entitled to receive prize money for such service from their Government or are liable to a penalty for failure to obey the orders given, such merchant ships lose their *status* as peaceable merchant ships and are to a limited extent incorporated in the naval forces of their Government, even though it is not their sole occupation to conduct hostile operations.

(13) A vessel engaged intermittently in commerce and under a commission or orders of its Government imposing a penalty, in pursuing and attacking enemy naval craft, possesses a *status* tainted with a hostile purpose which it can now throw aside or assume at will. It should, therefore, be considered as an armed public vessel and receive the treatment of a warship by an enemy and by neutrals. Any person taking passage on such a vessel can not expect immunity other than that accorded persons who are on board a warship. A private vessel, engaged in seeking enemy naval craft, without such a commission or orders from its Government, stands in a relation to the enemy similar to that of a civilian who fires upon the organized military forces of a belligerent, and is entitled to no more considerate treatment. (Ibid. p. 371.)

This memorandum apparently envisages two classes of armed merchant vessels, namely "peaceable armed merchantmen" and "warlike armed merchantmen." As to evidence as to character an earlier paragraph had said:

(3) A presumption based solely on the presence of an armament on a merchant vessel of an enemy is not a sufficient reason for a belligerent to declare it to be a warship and proceed to attack it without regard to the rights of the persons on board. Conclusive evidence of a purpose to use the armament for aggression is essential. Consequently an armament which a neutral Government, seeking to perform its neutral duties, may presume to be intended for aggression, might in fact on the high seas be used solely for protection. A neutral Government has no opportunity to determine the purpose of an armament on a merchant vessel unless there is evidence in the ship's papers or other proof as to its previous use, so that the Government is justified in substituting an arbitrary rule of presumption in arriving at the *status* of the merchant vessel. On the other hand, a belligerent warship can on the high seas test by actual experience the

purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the *status* of the vessel. (Ibid. p. 368.)

The application of such principles for determining status as those mentioned in paragraph (12) above would prove difficult if not impossible to establish, e. g., "orders to attack in all circumstances" would rarely be given. Some states no longer give prize money and this is not given for destruction of naval vessels.

This memorandum particularly shows the need of some definite and well-prepared statement as to merchant vessels in time of war.

Professor Hyde's opinion on United States memorandum of March 25, 1916.—

Apart from any question respecting the applicability of the foregoing declaration to the special conditions confronting the United States in March, 1916, the author, with greatest deference for the opinion of those responsible for the memorandum, confesses his inability to accept it as a statement of international law for the following reasons:

(*a*) It fails to heed the fact that the immunity of merchant vessels from attack at sight grew out of their impotency to endanger the safety of public armed vessels of an enemy, and that maritime States have never acquiesced in a principle that a merchant vessel so armed as to be capable of destroying a vessel of war of any kind should enjoy immunity from attack at sight, at least when encountering an enemy cruiser of inferior defensive strength.

(*b*) That an armed merchantman may retain its status as a private ship is not decisive of the treatment to which it may be subjected. The potentiality and special adaptability of the vessel to engage in hostile operations fraught with danger to the safety of an enemy vessel of war, rather than the designs or purposes of those in control of the former, however indicative of its character, have been and should be deemed the test of the right of the opposing belligerent to attack it at sight. In view of this fact the lawful presence on board the armed merchantman of neutral persons or property can not give rise to a duty towards the ship not otherwise apparent. Every occupant thereof must be held to assume that the enemy will use every lawful but no unlawful means to subject the vessel to control or destroy it.

(*c*) To test the propriety of an attack at sight by the existence of conclusive proof of the aggressive purpose of the merchantman places an unreasonable burden on a vessel of war of an unprotected type, whether a surface or undersea craft, for no evidence of the requisite purposes of the merchantman may be in fact obtainable until the vessel of war encountering the former becomes itself the object of attack. The mere pursuit of the merchantman, prior to any signal made to it, may cause the vessel to attack the pursuer as soon as it gets within range.

What constitutes, moreover, an act by way of defense must always remain a matter of uncertainty. The possession of substantial armament encourages the possessor to assert or claim that it acts defensively whenever it opens fire. Thus in practice the distinction between the offensive and defensive use of armament disappears, for the armed merchantman is disposed to exercise its power whenever it can safely do so. To presume, therefore, that such a vessel has a "peaceable character," on the supposition that it will not when occasion offers open fire on vulnerable vessels of war of the enemy is to ignore an inference fairly deducible from the conduct of vessels equipped with effective means of committing hostile acts. (2 Hyde, International Law, p. 469.)

British Admiralty opinion, 1916.—On December 21, 1916, Sir Edward Carson, First Lord of the Admiralty, in reply to a question in the House of Commons said:

His Majesty's Government can not admit any distinction between the rights of unarmed merchant ships and those armed for defensive purposes. It is no doubt the aim of the German Government to confuse defensive and offensive action with the object of inducing neutrals to treat defensively armed vessels as if they were men-of-war. Our position is perfectly clear—that a merchant seaman enjoys the immemorial right of defending his vessel against attack or visit or search by the enemy by any means in his power, but that he must not seek out an enemy in order to attack him—that being a function reserved to commissioned men-of-war. So far as I am aware, all neutral Powers, without exception, take the same view, which is clearly indicated in the Prize Regulations of the Germans themselves. I have confined myself to stating the general position; but my hon. Friend may rest assured that the Departments concerned are devoting continuous attention to all question connected with the theory and practice of defensive armament. (Parliamentary Debates, H. C. 5 series, LXXXVIII, p. 1627.)

Netherlands position on armed merchant vessels.—The status of armed merchant vessels in Dutch ports became a subject of much correspondence in 1914 and 1915. In a telegram to the British Legation at The Hague on August 8, 1914, Sir Edward Grey said:

> You should lose no time in explaining to Netherlands Government that British armed merchant vessels are armed solely for purposes of defence, in case they raise any question as to their position. Existing rules of international law grant the right of defence to all merchant vessels when attacked. There can be no right on the part of a neutral Government to order the internment of British-owned merchant vessels, nor to require them before putting to sea to land their guns, because the duty of such neutral Government to order the immediate departure or internment of belligerent vessels is limited to actual and potential warships, and as Great Britain does not admit that any Power has the right to convert merchant vessels into warships on the high seas, British merchant vessels that are in foreign ports cannot be so converted.
>
> As German rules permit German merchant vessels to be converted on the high seas, we maintain our claim to have them interned unless the neutral Government are prepared to assume responsibility for a binding assurance that no such conversion shall take place. (Parliamentary Papers, Misc. No. 14 [1917], p. 1.)

The Dutch proclamation of neutrality had prohibited entrance within Dutch jurisdiction of "warships of a belligerent and vessels of a belligerent assimilated to warships" and in a communication of April 7, 1915, to the British minister, the Netherlands Minister for Foreign Affairs said:

> As far as Dutch territory in Europe is concerned, this rule admits of no exception, except in the case of damage or by reason of stress of weather.

In replying to this Sir Edward Grey communicated a memorandum by Prof. A. Pearce Higgins:

> As there appears to be some doubt as to the legal status of merchant ships which are armed in self-defence, the following statement may be of interest and assistance to shipowners and shipmasters:—
>
> The practice of arming ships in self-defence is a very old one. There are Royal Proclamations from the time of Charles I order-

ing merchant ships to be armed, and to do their utmost to defend themselves against enemy attacks. During the Napoleonic wars the Prize Courts of Great Britain and the United States recognised that a belligerent merchant ship had a perfect right to arm in her own defence (the *Catherine Elizabeth* (British) and the *Nereide* (United States)). The right of a belligerent merchant ship to carry arms and to resist capture is definitely and clearly laid down in both of the cases just cited.

Chief Justice Marshall, of the United States, in the case of the *Nereide*, said: "It is true that on her passage she had a right to defend herself, and defended herself, and might have captured an assailing vessel."

In modern times the right of resistance of merchant vessels is also recognised by the United States Naval War Code, which was published in 1900, by the Italian Code for the Mercantile Marine, 1877, and by the Russian Prize Regulations, 1895.

Writers of weight and authority in Great Britain, the United States, Italy, France, Belgium, and Holland also recognise this right. The late Dr. F. Perels, who was at one time legal adviser to the German Admiralty, quotes with approval article 10 of the United States Naval War Code, which states: "The personnel of merchant vessels of an enemy, who in self-defence and in protection of the vessel placed in their charge resist an attack, are entitled to the status of prisoners of war."

The most recent authoritative pronouncement on this subject comes from the Institute of International Law, a body composed of international lawyers of all nationalities. This learned society, which meets generally once a year in different countries to discuss and make proposals on points of International Law, at its meeting in 1913 at Oxford prepared a Manual of the Laws of Naval Warfare which was adopted with unanimity. Article 12 of this Manual, which is in French, may be translated as follows:

"Privateering is forbidden. Except under the conditions specified in article 5 and the following articles, public and private ships and their crews may not take part in hostilities against the enemy.

"*Both are, however, allowed to employ force to defend themselves against the attack of an enemy ship.*"

The crews of enemy merchant ships have for centuries been liable to be treated as prisoners of war whether they resisted capture or not.

Crews who forcibly resist visit and capture, can not, if they are unsuccessful, claim to be released; they remain prisoners of war.

Defensively armed merchant ships must not assume the offensive against enemy merchant ships. They are armed for defence,

not for attack, but if they are attacked and they are able successfully to repel the attack and even to capture their assailant, such capture is valid; the captured ship is good prize as between the belligerents.

There is some authority, as in the Italian Code and Russian Prize Regulations, for saying that an armed merchant ship has a right to go to the assistance of other national or allied vessels attacked, and assist them in making a capture. But this is by no means such a well-established rule as the rule of self-defence. It will in nearly all cases be much more important for a defensively armed ship to get safely away with her cargo than to go to the assistance of another merchant ship, for in this case the safety of both may be placed in jeopardy.

The position of the passengers on a defensively armed ship, if no resistance is made, is the same as if they were on an unarmed merchant ship. If, however, the armed ship resists, they will, naturally, have to take their chances of injury or death. Unless they take part in the resistance, they are not liable, if the ship is captured, to be taken prisoners, merely because of the fact of resistance having been offered by the ship. (Ibid. p. 3.)

With the memorandum was a pamphlet by Professor Higgins on the same subject. On July 31, 1915, M. Loudon, the Minister for Foreign Affairs, replied:

In his note of the 12th June last Mr. Chilton returned to this subject. [Admission of armed merchant vessels.] He specially called my attention to the rule of international law which permits belligerent merchant vessels to defend themselves against enemy warships, and he was good enough to add to his note a memorandum and a pamphlet in support of his observations.

I have read these documents with much interest. However, there seems to me to be no connection between the above-mentioned rule and the question whether the admission into neutral ports of a certain category of vessels of belligerent nationality is or is not compatible with the observance of a strict neutrality. This latter question lies within the province of the law of neutrality. On the other hand, the rule invoked by Mr. Chilton is part of the law of war.

A belligerent merchant vessel which fights to escape capture or destruction by an enemy warship commits an act the legitimacy of which is indeed unquestionable, but which is none the less an act of war. (Ibid. p. 5.)

The British Government dissented from this view and made an elaborate argument against the Netherlands po-

sition involving statements of certain consequences that might follow. Many notes were exchanged, but the Netherlands maintained the right to exclude armed merchant vessels.

Official statements.—Governments of different States made known their attitude upon armed merchant vessels during the World War, usually by domestic regulations and sometimes in a more formal manner. There was much diversity and indefiniteness in these documents.

The Argentine Republic took action early in the World War, August 16, 1914, forbidding foreign merchant vessels to arm as auxiliary vessels of war and requiring such merchant vessels as were in port to declare within 24 hours if having auxiliary status. These were to be treated as vessels of war.

General Orders No. 133 of the Argentine navy department, August 17, 1914, provided:

(*c*) Foreign merchantmen which without being officially declared as auxiliary cruisers nevertheless carry cannon for their defense shall not make use of them in waters under State control, and the Government reserves to itself in case of their having served as auxiliary cruisers the right to treat them as such when they return to waters under its jurisdiction.

As the legal status of ships of war is not conceded these vessels, any hostile act of theirs in waters under the jurisdiction of the State shall be considered as an act in open violation of the law of the country.

(*d*) The general prefecture of ports shall take note of all foreign merchantmen which may have cannon for defense, either mounted or unmounted, or emplacements for cannon, to the end that they be especially watched.

(*e*) Among the foreign merchantmen armed with cannon there are some that carry their cannon on the stern only, and with a very restricted firing sector; in other words, they are guns which may fire only directly astern. It may well be conceded that the sole object of these guns is the defense of the boat. Other vessels carry them in the bow and on both sides—that is to say, in offensive sectors. Even though the technical requisites for considering these boats as auxiliary cruisers do not appear, it is nevertheless evident that their armament suggests their purpose. Hence supervision in such cases shall be especially rigorous.

(*f*) It is to be borne in mind that by virtue of the provisions of article 31 in the regulations of the port of the capital and of La Plata no boat is to enter them with explosives aboard. Consequently if any merchantmen armed with cannon carry powder on board they are not to be permitted to enter the harbor before disembarking ammunitions.

(*g*) The general prefecture of ports will take necessary measures to prevent the departure of war vessels, auxiliary cruisers, or even armed merchantmen until 24 hours after the departure from the same harbor of any other armed or unarmed merchantman flying the flag of a hostile country.

(*h*) War vessels and auxiliary cruisers flying belligerent colors whose stop in territorial waters is limited to 24 hours shall not cast anchor in them except for reasons of exceptional urgency (caso de fuerza mayor).

Armed merchantmen which it is suspected may be converted into auxiliary cruisers shall be watched with particular care, so that they may not be able to thwart the precautions established for the protection of steamers departing each in the order of its turn by casting anchor with hostile intent within the territorial waters. (1917 N. W. C. Int. Law Docs. p. 23.)

The Chilean rules of August 14, 1914, issued by the Minister of Foreign Relations, provided that:

1. All vessels at anchor in Chilean ports or which navigate in the national territorial waters may be obliged to submit to the inspection of their papers by the Chilean authorities, which may, whenever they deem it necessary, according to the rules which are hereafter specified, proceed anew to the inspection of the vessel, of its passengers, of its cargo, and of its documents. In consequence, the clearance of any vessel can not be authorized, whatever its cargo and whatever its destination, until the ship has presented complete manifests.

2. Permission to depart will be given to no merchant vessel which has altered or tried to alter its *status*, if there is reason to believe that the vessel has intended to transform itself into an auxiliary cruiser or an armed vessel in any degree whatsoever.

The following acts will be considered as furnishing a presumption of change of *status:*

(*a*) To alter the location or position of guns which are on board the vessel at the time of its arrival; to change the color, the rigging, or the equipment of the vessel in a manner to create a presumption that this change has an object relating to military operations;

(*b*) To embark guns, arms, or munitions in the circumstances which indicate adaptation of the vessel to military ends;

(*c*) To refuse to take on board passengers when the vessel possesses suitable accommodation for them;

(*d*) To load abnormal quantities of coal.

3. The maritime authorities should demand of foreign consuls who visé the papers of vessels a declaration in reference to the character of the vessel, stating whether it is a question of a merchant vessel engaged in the transport of merchandise and passengers, or whether it forms a part of the armed forces of the nation to which it belongs. In this latter case the vessel will be warned that it must depart after twenty-four hours and with coal only sufficient for the journey to the nearest port of its nation. (1916 N. W. C. Int. Law Topics, p. 16.)

In publishing these rules the Minister of Foreign Affairs stated "The Government of the United States has issued similar regulations."

A note from the same office on March 15, 1915, involves some further propositions which were due to the British query as to whether auxiliary naval vessels might resume their merchant-vessel status.

The Government of Chile desires to settle the question suggested by the note above indicated according to the attitude of strict neutrality adopted by it since the beginning of the war and also in conformity with the general convenience of the American Continent, since the great European conflict has demonstrated in an evident manner that the international rules should in the future take into consideration the particular conditions of this hemisphere.

Inspired by this idea, the Chilean Government sees no inconvenience in admitting into the ports and jurisdictional waters of Chile and in treating in all respects as merchant vessels, vessels which have been auxiliaries of the fleet of one of the belligerent States, when the said vessels fulfill the following conditions:

1. That the auxiliary vessel has not violated Chilean neutrality;

2. That the reconversion took place in the ports or jurisdictional waters of the country to which the vessel belongs or in the ports of its allies;

3. That this was effective: that is to say, that the vessel neither in its crew nor in its equipment gives evidence that it can be of service to the armed fleet of its country in the capacity of an auxiliary, as it was formerly;

4. That the Government of the country to which the vessel belongs communicates to all interested nations, and in particular to neutrals, the names of auxiliary vessels which have lost this status to resume that of merchant vessels; and

5. That the same Government give its word that the said vessels are not in the future intended for the service of the armed fleet in the capacity of auxiliaries. (Ibid. p. 28.)

Later another communication states:

The Chilean ports will receive merchant vessels armed for defense when the respective Governments previously communicate to us the name of the vessel which travels under these conditions and also the route, roll of crew, list of passengers, and cargo, as well as the management and the armament of the vessel, demonstrating that it is in reality a question of a merchant vessel which is not intended to carry on hostile acts nor to cooperate in the warlike operations of enemy fleets.

If an armed merchant vessel arrives without this previous notice of the Government, it will be considered and treated as suspicious. If, violating their declaration, these vessels engage in operations of war against other merchant vessels without defense they will be forthwith considered and treated as pirates, since the Government of the country under whose flag they fly will have formally declared their exclusively commercial character by not incorporating them into its fleet of war. (Ibid. p. 31.)

Cuba, March 3, 1916, reproduced as a statement of its policy the memorandum issued by the United States September 19, 1914 (ante, p. 83).

There were differences in the regulations issued by other countries. The methods of determining whether an armed merchant vessel was to be treated as a vessel of war or as a merchant vessel also varied at different times in some states. There were also interpretations which led to misunderstandings. Some of these indicated that it was as Mr. Churchill had predicted in 1913, "a period of retrogression."

British explanation, 1917.—That British armed merchant vessels would be liable in ports of the United States under some of the principles set forth in the memorandum of March 25, 1916, is evident from the statements of Sir Edward Carson and Mr. Churchill in 1917.

Mr. Winston Churchill, speaking on February 2, 1917, before the House of Commons, said:

The object of putting guns on a merchant ship is to compel the submarine to submerge. If a merchant ship has no guns, a submarine with a gun is able to destroy it at leisure by gunfire, and we must remember that on the surface submarines go nearly twice as fast as they do under water. Therefore, the effect of putting guns on a merchant ship is to drive the submarine to abandon the use of the gun, to lose its surface speed, and to fall back on the much slower speed under water and the use of the torpedo. The torpedo, compared with the gun, is a weapon of much more limited application. The number of torpedoes which can be constructed in a given time is itself subject to certain limits. Any trained artillerist or naval gunner can hit with a gun, but to make a submerged attack with a torpedo requires a much higher degree of skill and training. One of the things we counted on to check the indefinite development of German submarine expansion was the difficulty of training crews. That difficulty does not manifest itself as long as submarines are free to use the gun, but it will undoubtedly manifest itself when they are driven back on the almost exclusive use of the torpedo, by the fact that the great majority of merchant ships which they meet will be effectively armed, and the result will be, or should be to a certain extent, that a very large proportion of torpedoes will be wasted, because the difficulty of firing at a ship advancing with accuracy is very great, and there is only a very limited arc ahead of a ship from which a torpedo can be discharged with the certainty of getting home. Also the torpedo is easy to dodge, and a shell is impossible to dodge. I thought it was right to explain in a few simple words this matter which is bread and butter to every family in this country. It is of the highest importance that the ships which are being built to replace existing tonnage, what we might call tonnage casualties, should possess a speed superior to the speed of an enemy submarine submerged. (Parliamentary Debates, 5 s., H. C., XC, p. 1380.)

The parliamentary secretary to the Ministry of Shipping Control indicated his assent and Mr. Churchill continued:

I am very glad my hon. Friend assents to that, because it is of the utmost importance that the Admiralty's view on a matter of that kind should be fully realised and adopted by the Department of Shipping Control. Another point, which is of great importance, is that not only should guns be put on the ships, but there should be at least one good gun-layer on each. I dare say

that is becoming the case now, but it was not the case until a short time ago, and many cases have been brought to notice of vessels which carried guns but carried no man really competent to direct the shot to its objective. (Ibid. p. 1381.)

While under the guise of retaliation a belligerent might arm and use its merchant vessels for any purpose it saw fit as regards its enemy, such appeal to the principle of retaliation would give these vessels no special rights in neutral ports.

German war-zone note, January 31, 1917.—After an explanatory statement the German ambassador presented to the United States a memorandum on January 31, 1917, recounting what Germany conceived to be disregard by the Allies of rules of international law and stating that:

Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing after February 1, 1917, in a zone around Great Britain, France, Italy, and in the Eastern Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc. etc. All ships met within that zone will be sunk. (Spec. Sup. Am. Jour. Int. Law, vol. 11, 1917, p. 333.)

Breaking of diplomatic relations, February 3, 1917.—In reply the Secretary of State reviewed the prior action of Germany and the promises which the United States understood had been made in regard to the conduct of submarine warfare and concluded:

In view of this declaration, which withdraws suddenly and without prior intimation the solemn assurances given in the Imperial Government's note of May 4, 1916, this Government has no alternative consistent with the dignity and honor of the United States but to take the course which it explicitly announced in its note of April 18, 1916, it would take in the event that the Imperial Government did not declare and effect an abandonment of the methods of submarine warfare then employed and to which the Imperial Government now purpose again to resort.

The President has, therefore, directed me to announce to Your Excellency that all diplomatic relations between the United States and the German Empire are severed, and that the American ambassador at Berlin will be immediately withdrawn, and in accordance with such announcement to deliver to Your Excellency your passports. (Ibid. p. 337.)

American attitude after breaking diplomatic relations.—On February 3, 1917, the President explained in an address to Congress the reasons for the breaking of diplomatic relations with Germany. Negotiations were continued through the Swiss minister.

A bill was introduced, February 27, 1917, to authorize the President to provide for the arming of American merchant vessels "with defensive arms fore and aft, and also with the necessary ammunition and means of making use of them." On March 12 announcement was made to the diplomatic representatives in Washington that the Government had "determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board." (Ibid. p. 345.)

After February 27 the United States also admitted to its ports vessels of the allied belligerents armed fore and aft.

Other neutral problems.—The neutral may find difficulty in determining many questions if armed merchant vessels are to be allowed. Such means of determination as were accepted in the World War are without general sanction. How far might a neutral without liability allow an armed merchant vessel under the merchant flag of a belligerent state to take on war supplies, make repairs, etc., when that state advocates conversion and reconversion on the high seas without limitation?

Article XIV of the treaty limiting naval armament, February 6, 1922, is as follows:

> No preparations shall be made in merchant ships in time of peace for the installation of warlike armaments for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6 inch (152 millimetres) calibre.

There might be under terms of this situation vessels adapted in accordance with Article XIV. Article XIV has been thought by some to be a tacit sanction for the arming of merchant vessels, but it should be observed that this article provides in time of peace for strengthen-

ing decks "for the purpose of converting such ships into vessels of war" and that no other preparations for this purpose shall be made. It is apparently assumed that in time of war merchant vessels will be converted and that in time of peace decks will be stiffened for that purpose.

If in time of peace a merchant vessel has had its decks stiffened and after the outbreak of war carries guns not exceeding 6-inch caliber, can it claim to be a merchant vessel armed only for defense or would any armament on such a vessel put it in the class of a war vessel? May it be maintained that the stiffening of decks was not for the purpose of conversion into vessels of war but for installing guns for defense?

The wording of Article XIV does not necessarily preclude such an interpretation as the latter, and the French translation, which is equally official, would possibly permit such an interpretation.

The opposing belligerent might, however, maintain that deck strengthening in time of peace was for the purpose of converting the vessel into a vessel of war, and that therefore the mounting of a gun of any caliber on such a vessel was a fulfillment of the purpose making the vessel a vessel of war so far as belligerent relations were concerned. A neutral might maintain the same position.

Probably the very vessels which might have had deck strengthening would be the vessels which, remaining in the merchant service, would arm for defense, and if thus armed would, under the belligerent enemy's interpretation, become liable as vessels of war. The argument would be briefly that strengthening decks is to prepare for conversion into a vessel of war. Putting guns on board is evidence of conversion; therefore a vessel having guns on decks stiffened in time of peace is a vessel of war. The belligerent can not take the chance of being sunk while making an investigation to find out whether such a vessel has been legally converted into a vessel of war in a home port in accord with the rules of a Hague convention.

The granting of subsidies and special franchises, the provisions for taking over into public service in time of war, and other state acts complicate the establishing of a well-defined basis for neutral judgment of the status of merchant vessels in war time. The public ownership of merchant vessels with varying degrees of public control adds further difficulties.

Conclusion.—There have been wide differences of opinion and practice in regard to the treatment of armed merchant vessels.

It can not be said that there is now agreement as to the laws in regard to armed merchant vessels, but under modern conditions the ancient reasons for arming do not exist, as piracy and sea thieving of early days no longer exist. Arming might be to meet a merchant vessel of the enemy similarly armed, as was the British contention just before and in the early part of the World War. Soon, however, it was apparent from documents and practice that an armed merchant vessel's master would use his arms against what he might consider an inferior vessel. For safety of personnel and property, a merchant vessel should remain a peaceful vessel. A vessel of war should likewise conduct itself in accord with the rules of war, and should not be put in peril by vessels whose immunity and right to safety it is under obligation to respect. (Wilson, Handbook of International Law, 2d ed., p. 306.)

Late state practice in owning and operating more or less directly some of the merchant marine under its flag would seem to make some of the early opinions scarcely applicable to present conditions. These and many other reasons point to the desirability both for belligerents and neutrals of a clear determination of the status of armed merchant vessels in the time of war.

SOLUTION

Practice and opinion since 1914 afford some support for the position of each neutral and for the protest of each belligerent, but the position of state C seems to be gaining support. The whole situation shows the need of clear determination of the status of armed merchant vessels.